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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-857

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

YESHIVA UNIVERSITY FACULTY ASSOCIATION,
Intervenor-Petitioner,

vs.

YESHIVA UNIVERSITY,
Respondent.

BRIEF AMICUS CURIAE OF THE AMERICAN FEDERATION OF TEACHERS (AFL-CIO).

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BRIEF AMICUS CURIAE OF THE AMERICAN FEDERATION OF TEACHERS (AFL-CIO).

INTEREST OF AMICUS.

The American Federation of Teachers (AFL-CIO), is an organization of over 1,000 affiliate locals with a total membership in excess of 450,000 members. Its affiliate locals have established bargaining relationships with a large number of school districts.

Since 1967, AFT affiliate locals at more than 240 institutions of higher education have established collective bargaining relationships. The outcome of the instant litigation could have impact on the rights of the members of the American Federation of Teachers at institutions of higher education.

Although the decision of the Court of Appeals states that the decision is made on the particular facts before the Court, a review of the factual finding of the NLRB shows that the role of the faculty at Yeshiva University is quite similar to that at many institutions of higher education with regard to faculty input into decision-making. A decision affirming the holding of the Court of Appeals could therefore have a major negative impact on other institutions where a collective bargaining relationship exists or could be developed.

ISSUES PRESENTED.

Whether faculty members who participate in governance structures at institutions of higher education are managerial or supervisory employees excluded from the protections of the National Labor Relations Act.

INTRODUCTORY STATEMENT OF FACTS.

This case is before this Court on appeal from the decision of the Second Circuit Court of Appeals denying enforcement of an NLRB order directing Yeshiva University to bargain with a duly certified unit of its academic professional employees, commonly known as the Yeshiva University Faculty Association.

The proceedings in this matter were initiated by a petition filed with the NLRB on October 30, 1974 by the Yeshiva University Faculty Association (hereinafter referred to as "Union"), for a representation election for certain full-time academic employees. The proposed unit included full-time faculty appointed to the positions of Professor, Associate Professor, Assistant Professor, or Instructor, with full-time teaching loads or equivalents, but excluded part-time faculty and other specific categories of employees not germane to the issues before this Court.

Hearing on the matter was conducted on 21 dates from November 26, 1974 to May 6, 1975. At the first hearing, the entire record of prior representation proceedings, consisting of the transcript of nine days of hearings and numerous exhibits, was received into evidence and incorporated into the record.

On December 5, 1975, the NLRB issued its decision directing that an election be held. *Yeshiva University*, 221 N. L. R. B. 1053. An election was held December 16 through 20, 1976. The members of the unit voted 91 to 50 for representation by the Union. The NLRB certified the Union as the exclusive bargaining agent on December 29, 1976.

On February 2, 1977, the Union filed charges of violation of Sections 8(a)(1) and 8(a)(5) of NLRA by Yeshiva University (hereinafter referred to as "University"). The charges were based on the University's refusal to recognize and bargain with the Union. The University admitted its refusal to bargain but

asserted that the certification of the Union by the NLRB was improper because members of the bargaining unit were managerial and supervisory employees. Furthermore, the University asserted for the first time that certification of a unit which did not include part-time faculty was improper without the NLRB first conducting a rule-making proceeding pursuant to the Administrative Procedures Act.

On April 12, 1977, the General Counsel for the NLRB moved for summary judgment affirming the Union's charges. The Board granted the motion for summary judgment on August 24, 1977, finding that the University had violated 8(a)(1) and 8(a)(5) of the NLRA by its conduct. The NLRB petitioned the Second Circuit Court of Appeals for an Order to compel the University to bargain with the Union. The Second Circuit Court of Appeals declined to affirm the decision of the NLRB on the asserted basis that the employees in the bargaining unit were supervisory and managerial employees. *NLRB* v. *Yeshiva*, 582 F. 2d 686 (2d Cir., 1978).

The NLRB and intervenor Union filed Petitions for Certiorari which were granted on February 21, 1979.

In deference to the administrative expertise of the NLRB, we will rely on their Statement of Facts for the factual basis of this controversy. We would, however, point out that the Second Circuit Court of Appeals in its opinion saw fit to make its own separate factual findings on the record below without any discussion of the reasons for disturbing the finding made by the NLRB after extensive proceedings. The import of the Second Circuit's finding would indicate that in most areas of decision-making, the faculty at Yeshiva, acting as a collective body, made decisions which were unchallenged by the administration of the University.

The finding that the faculty at Yeshiva University had total control of decision-making must have profoundly shocked the faculty who had found it necessary to elect a collective bargaining representative. Neither the Yeshiva faculty nor the

faculties of other institutions of higher education have the kind of control that the Second Circuit Court suggests. We would urge this Court to accept the factual findings of the NLRB rather than the revisions offered by the Second Circuit because the Second Circuit acted improperly in substituting its factual finding for those of the administrative agency.

Based on the NLRB's findings, it can be seen that the role of the faculty at Yeshiva is consistent with that at numerous educational institutions over which the NLRB has asserted jurisdiction.

There now exist approximately 600 campuses covered by collective bargaining agreements between faculties and institutions of higher education. The experience at these institutions demonstrates that collective bargaining works. It has not destroyed the institutional governance structures but serves in a cooperative role in the resolution of problems. In light of Congressional action extending jurisdiction of the NLRB over professional employees and the legislative history of the Hospital Amendments, Pub. L. 93-360, 88 Stat. 395 (1974), assertion of jurisdiction over academic employees is clearly within the province of the NLRB and should be upheld.

ARGUMENT.

I.

FULL-TIME FACULTY MEMBERS AT YESHIVA UNIVERSITY ARE PROFESSIONAL EMPLOYEES ENTITLED TO THE PROTECTION OF THE NLRA.

A. Full-Time Faculty Members Are Neither Supervisory Nor Managerial Employees.

The Court of Appeals agreed with the findings of the NLRB that full-time faculty at Yeshiva University are professional employees as defined in Section 2(11) of the NLRA. It maintained, however, that the faculty ran the school in that they made recommendations which the University saw fit to implement. They cited to such items as the role of faculty in determining the courses to be taught, the assignment of courses to teachers and teaching load, and the process of initial recommendations on hiring and tenure.

The factual findings of the NLRB clearly show that faculty input into the above areas does not follow a traditional industrial model which would confer supervisory or managerial status on the faculty. Full-time faculty do meet and make resolutions on a wide range of professional and institutional concerns. Faculty members also serve on joint committees on subjects ranging from grading practices to faculty welfare. The faculty welfare committees at several of the schools of the University have in fact negotiated with the University administration on behalf of the full-time faculty concerning such traditional collective bargaining subjects as salary scales. In all of these activities, however, the faculty both individually and collectively represent the position of the faculty, not the overall position of the University administration. These committees do not

have the ultimate decision-making authority. They merely set forth the position of these professionals from the perspective of their educational expertise. The final decision-making is entrusted to the University's Board of Trustees, acting through the University President and the Deans of the various colleges. It is these officials who must make the decisions of reconciling the educational goals and institutional needs with available financial resources. It is these officials whose function it is to perform the administrative institutional tasks.

Faculty members are hired to teach and conduct research. The input they offer into the governance structure represents their consensus on educational goals. The University's President has the power to act on the University's behalf in overruling any of the recommendations made by the various committees.

The faculty does not control the University. The structure of the University is not the idealized model of Cambridge or Oxford, where groups of scholars band together to render educational services and defer only to their own cooperative authority. Rather, it is a corporate structure with a governing body, i.e., Board of Trustees, which decides to offer instruction and then hires the faculty to provide it. It is true that as a result of specialization of knowledge and complexity of searching out faculty, the administrative branch will in most cases rely on the faculty for recommendations concerning their peers. Such recommendations, however, are not binding and do not go to the essence of the role of the faculty at the institution. The faculty is there to teach and perform research. It is for these functions that they are retained and receive compensation.

Congress has expressly acted to include "professional employees" in the NLRA (Section 2[12] NLRA, 29 U. S. C. 152 [R]). At the time of the inclusion of professional employees, Congress realized that the definition of a professional employee overlaps with functions that have traditionally been defined as supervisory and managerial. *Palace Laundry Dry Cleaning*, 75 N. L. R. B. 320, 323 n.4 (1947) and *NLRB* v. *Bell Aerospace*

Co., 416 U. S. 267, 286-287 (1974). The NLRB has been entrusted by Congressional mandate and long experience with the delicate task of reconciling these concepts. *Marine Engineers* v. *Interlake Steamship Co.*, 370 U. S. 173, 179-180 (1962), *Westinghouse Electric Corp.* v. *NLRB*, 424 F. 2d 1151 (7th Cir., 1970). As our discussion below will show, the NLRB has consistently held that the definition of "supervisory" and "managerial" employees involves not a mechanical application of a test but an analysis of the functions performed by the employees to see if their roles are so aligned with the administration of the institution as to require exclusion from the protection of the NLRB. Only those employees whose function it is to operate the institution should be excluded.

As the Board explained in *General Dynamics Corp.*, 213 N. L. R. B. 851, 857 (1974):

> "[M]anagerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management. Work which is based on professional competence necessarily involves a consistent exercise of discretion and judgment, else professionalism would not be involved. . . . A lawyer or a certified public accountant working for, or retained by, a company may well cause a change in company direction, or even policy, based on his professional advice alone, which, by itself would not make him managerial."

Certainly the faculty at Yeshiva, as at most institutions of higher learning, expresses its views on issues within its expertise. These opinions, even if respected by the University, are subject to the ultimate authority of the Board of Trustees which through its administrative officers deals not only with the educational policy aspects of educational decisions but with economic and institutional concerns in arriving at an ultimate decision. That fact was recognized by the Court of Appeals for the First Circuit in *NLRB* v. *Wentworth Institute*, 515 F. 2d 556 (1st

Cir., 1975), where the court stated "the *trustees*, who have ultimate authority, as a matter of course delegate to the faculty or its representatives varying amounts of authority and influence over educational policy and the governance of the institution". Such delegation did not give rise to managerial status.

The NLRB has dealt with the assertion that faculty are managerial or supervisory employees in numerous representation proceedings. In one of its early decisions in this area, *Adelphi University*, 195 N. L. R. B. 639, 648 (1972) the NLRB stated:

> "In this case . . . the ultimate authority does *not* rest with the peer group but rather with the board of trustees. Thus, although the facts indicate that much respect is paid by the trustees to the recommendations of the collegial body, it is equally clear that the trustees reserve the ultimate authority for themselves. It is also clear that the board of trustees, even if it had such power, has not attempted to convert the committees into managerial or supervisory entities. They are not advised to advocate management's interests in making their decision, nor are they advised that they are management's representatives in making them."

This formulation of NLRB policy has been applied in numerous representation proceedings involving faculty bargaining units. See e.g., *Syracuse University Law School*, 204 N. L. R. B. 641 (1973); *University of San Francisco Law School*, 207 N. L. R. B. 12 (1973); *New York University Law School*, 205 N. L. R. B. 4 (1973); *Farleigh Dickinson University*, 205 N. L. R. B. 673 (1973); *Adelphi University*, 195 N. L. R. B. 639 (1972); *College of Pharmaceutical Services*, 197 N. L. R. B. 959 (1972); *Fordham University*, 193 N. L. R. B. 134 (1971); *Kendall College*, 228 N. L. R. B. 1083 (1977); *Wentworth Institute*, 210 N. L. R. B. 345, enforced, 515 F. 2d 550 (1st Cir., 1975); *Loretto Heights College*, 205 N. L. R. B. 1134 (1973); *Boston University*, 228 N. L. R. B. 1008 (1977), enforced, 575 F. 2d 301 (1st Cir., 1978), petition for cert. pending, No. 78-67.

In reviewing the University's argument that faculty members are supervisory employees, it is appropriate to go first to the NLRA Section 2(11) which defines "supervisor" as:

> any individual *having authority, in the interest of the employer,* to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment. (Emphasis added.)

The Court of Appeals would have this Court read the definition in an extremely expansive manner requiring a finding of supervisory status if any of the powers enumerated are exercised. The NLRB has consistently interpreted the language of Section 2(11) in light of the Congressional mandate to provide collective bargaining to employees unless their duties for the employer include a substantial supervisory role. The NLRB's position is set forth in *General Dynamics Corp.*, 213 N. L. R. B. 851, 858 (1974):

> While it is true that the authorities contained in Section 2(11) of the Act are indicative of supervisory authority, it does not necessarily follow that the exercise of one or more of these authorities *ipso facto* confers supervisorial authority unless it is exercised in the genuine managerial sense. This also is clear from the legislative history of the Taft-Hartley Act of 1947 wherein the Conference Committee adopted the Senate version of the bill, S. 1126, which excluded supervisors, but with a narrower definition thereof than the House version, H. R. 3020, by distinguishing between "leadmen, set-up men and other minor supervisory employees . . . and the supervisor vested with genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with regard to such action." (citations omitted.)

The basis of the exclusion of managerial and supervisory employees is to have employees entrusted with administrative functions loyal to the employer. Faculty, when giving their

recommendations, are not acting from the perspective of the interests of the employer, but rather from their independent judgment on matters within their professional expertise.

To the extent that the faculty is acting from a perspective other than individual professional expertise, its action is taken in the interest of the faculty as a whole rather than that of the institution.

The interests of the faculty and that of the Board of Trustee's are not congruent. Like any other workers, the faculty have an interest in obtaining higher wages and benefits. Their determinations on classload and professional prerogatives may clash with the available financial resources and institutional concerns. The history of faculty bargaining and the vote for representation by a collective bargaining representative is a further indication that the interest of the faculty and the administrators of the institution are in conflict. It is precisely these types of conflicts that collective bargaining under the protection of the NLRB was established to resolve and channel into constructive dialogue.

The determination of the status of a group of employees is a matter particularly within the expertise of the NLRB. As stated in *NLRB* v. *Metropolitan Life Insurance Co.*, 405 F. 2d 1169, 1172 (2d Cir., 1968):

> "Inasmuch as infinite variations and gradations of authority can exist . . . any drawing of the line between personnel of management and the rank-and-file workers may require some expertise; the Board's findings relative thereto are entitled to great weight."

An example of the accepted approach to reviewing NLRB determinations can be found in *NLRB* v. *Stark*, 525 F 2d 422, 431 (1975):

> "The only other point requiring discussion is the respondent's contention that Peters was a supervisor within § 2(11) and thus not an "employee", § 2(3), protected by § 8(a)(1) and (3) . . . it is settled law that the Board's

> determination of this question receives even more than usual weight . . . [assigned to administrative agency determinations].

Certainly where the NLRB's determination is based on a consistent application of the principles first enunciated in *Adelphi University* and reapplied in numerous proceedings, the overturning of the NLRB's holding will have an unsettling effect on numerous collective bargaining relationships which have been established. See *Wall Street Journal,* September 29, 1978, Article by John Benzel.

The role of faculty members at Yeshiva University is consistent with that at numerous institutions where the NLRB has certified faculty bargaining units. It would be highly inappropriate to overrule the NLRB's findings in this area of its special expertise, particularly since, as will be more fully set forth below, Congress has implicitly approved the assertion of NLRB jurisdiction in this area.

B. The NLRB's Determination to Take Jurisdiction Over Collective Bargaining at Not-For-Profit Educational Institutions Is Consistent with Its Congressional Mandate.

In 1970, the NLRB reversed its long standing position of refusing to take jurisdiction over private not-for-profit educational institutions. See *Cornell University,* 183 N. L. R. B. 329 (1970). In its decision, the NLRB noted that educational institutions have had increasing impact on commerce by reason of the number of people employed and volume of business activities generated by these institutions. In addition, educational institutions have requested and received research grants and other monies from both governmental and private sources. In view of the increasing impact of education on the economy, it was determined that there was no longer any viable rationale for withholding the protection of collective bargaining from this large portion of the work force. *Id.*

The initial decision of the NLRB to assert jurisdiction in the context of an educational institution did not create a major stir possibly because the group of employees involved in the case were cafeteria workers and the employer would otherwise have been required to hold an election under the auspices of the New York State Labor Relations Board. K. Kahn, "The NLRB and Higher Education: The Failure of Policy-making Through Adjudication," 21 *UCLA* 63 (1973), pp. 64-65.

Once the NLRB assumed jurisdiction over not-for-profit educational institutions, the question of certification of faculty bargaining units came into focus. The NLRB in dealing with this issue quite properly drew from its experience in the private sector. *Fordham University,* 193 N. L. R. B. 134 (1971); *S. W. Post Center of Long Island University,* 189 N. L. R. B. 109 (1971).

The NLRB's decision to certify faculty bargaining units touched off extensive debate and research in the area. One of the early critics of the NLRB's actions was Kenneth Kahn. See Kahn, "The NLRB and Higher Education: The Failure of Policy-making Through Adjudication," 21 *UCLA* Law Review, 63 (1973). An assertion in the article by Kahn and implicitly accepted by the Court of Appeals is that Congress has never explicitly recognized and dealt with the propriety of the NLRB's assertion of jurisdiction over institutions of higher education. *Id.* at 85. In support of that assertion, Kahn cites the legislative history which mentions lawyers, engineers, and medical personnel but makes no mention of faculty members at institutions of higher education in the discussion of professional employees. See H. R. Conf. Rep. No. 510, 80th Congress, First Session 36 (1947).

While that statement may have been true at the time the Kahn article was written, it no longer is valid. The NLRB has been certifying bargaining units of faculty since 1971. Congress has had ample opportunity since that time to take action clarifying or limiting the NLRB discretion. It should first be noted

that no positive action is necessary to ratify the NLRB's actions in this area, since the agency has been statutorily granted wide discretion in determining jurisdiction. NLRA, § 9(b) as amended 29 U. S. C. A. § 159(b). See also *Kendall College* v. *NLRB*, 570 F. 2d 218 (1977).

In 1974, Congress had before it several amendments which would extend jurisdiction of the NLRB over not-for-profit hospitals. Early in the Senate debates Senator Harrison Williams, Chairman of the Labor and Public Welfare Committee, speaking in support of those amendments, acknowledged the NLRB's assertion of jurisdiction over institutions of higher education, stating:

> "The current exemption from NLRA of not-for-profit hospitals is not only inconsistent with the protection enjoyed by proprietory hospitals and other types of health care institutions, but it also is inconsistent with the coverage of other not-for-profit activities. The NLRB has currently asserted jurisdiction over nonprofit colleges and universities, philanthropic lodging houses, nonprofit educational broadcast stations, and nonprofit cooperative insurance companies."
>
> "It would be highly unjust and arbitrary to continue to exclude nonprofit hospital workers from the national labor policy of recognizing and in fact encouraging the right of workers to organize and bargain collectively. . . ."
>
> 120 Congressional Record 12938 (1974), Reprinted in Legislative History of Non-Profit Hospitals under the NLRA (1974) (Committee Print by Sub-Committee on Labor of Senate Committee on Labor and Public Welfare), at pp. 95-96.

Thus it can be seen that in passing the 1974 Amendment to the NLRA which brought not-for-profit hospitals under the jurisdiction of the NLRB, Congress both knew of and approved the prior assertion of jurisdiction over institutions such as not-for-profit colleges and universities by the NLRB. Implicit in this approval is the approval of the certification of faculty bargaining agents, since at the time of the debates the NLRB had certified numerous faculty collective bargaining units. See *C. W. Post Center of Long Island University*, 189 N. L. R. B. 904 (1971), *Fordham University*, 193 N. L. R. B. 134 (1971).

Although many commentators in the education field would state that certification of faculty bargaining units presents special problems, many of the unit determination questions involving professionals which were specifically delineated in the 1947 debate on the inclusion of § 2(11) of the Act are every bit as complex. See *General Dynamics*, 213 N. L. R. B. 851 (1974) and *Skidmore, Owens & Merrill*, 192 N. L. R. B. 920 (1971). The complexity of determination in this area, which was specifically delegated to the NLRB, provides a persuasive reason for judicial deference to the NLRB in this area. As stated in *Kendall College* v. *NLRB*, 570 F. 2d 216, 220 (1977):

> ". . . As indicated previously, the primary responsibility in making unit determinations rests with the Board. Those determinations are not to be made on the basis of immutable and inflexible principles, for it must be remembered also that the adaption of the Act to the "changing patterns of industrial life is entrusted to the Board. *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 266, Supreme Ct., 958, 968, 43 L. Ed. 2d 171 (1975); *Cf., Lutheran Hospital of Milwaukee, Inc.* v. *NLRB*, 564 F. 2d 208 (7th Cir., 1977), pp. 214-5."

In the present case, the Court of Appeals plainly overstepped its bounds when it substituted its own policy determinations for those which have been adopted by the NLRB by reference to criteria which have been developed after review of numerous representational proceedings with the apparent assent of Congress.

II.

COLLECTIVE BARGAINING AND JOINT GOVERNANCE ARE COMPATIBLE AND THE COORDINATION OF THESE STRUCTURES SERVES AS THE BEST METHOD FOR PROFESSIONAL EDUCATIONAL EMPLOYEES TO MEET THE ECONOMIC AND ACADEMIC CHALLENGES THEY FACE.

Another basis implicitly adopted by the Court of Appeals and discussed in the Kahn article for limiting collective bargaining by faculty is the belief that collective bargaining is necessarily in conflict with the joint governance structure which exists at many institutions of higher education. In support of that assertion, Kahn raises the specter that the advent of collective bargaining necessarily leads to the transfer of all decision-making to the bargaining table with the disintegration of joint governance. This simply has not happened.

As pointed out by James P. Begin, collective bargaining and joint governance are not necessarily competitive and antagonistic. See Begin, "Faculty Governance and Collective Bargaining: An Early Appraisal", *XLV Journal of Higher Education*, No. 8, November, 1974, p. 583. The potential range of outcomes is somewhat broader. One emerging trend has been the formulation of a dual and co-existing form of governance with, (a) the incorporation and protection of traditional procedures within the collective bargaining agreement, or (b) the development of separate systems of faculty participation: utilization of bargaining for economic items while utilization of governance for educational policy issues. Finally, some universities have moved to improve the quality of joint governance structures in order to discourage the introduction of or undermine the existence of a bargaining agent. *Id.* at 583-5.

None of the four-year institutions examined by Professor Begin had dismantled their joint governance structure as a result of the introduction of collective bargaining. *Id.* at 584. One two-year institution in New Jersey did abolish its joint governance structure in the early stages of the bargaining relationship. However, as the parties developed more sophistication, they developed and implemented a joint governance structure. Ironically, they were at an impasse on numerous other items. *Id.*, at 584.

The impact of collective bargaining on governance at institutions of higher education was also reviewed in Morand, "Collective Bargaining and Collegiality: A Pennsylvania View", 9 *Rutgers-Camden Law Journal*, 699 (1978).

Martin J. Morand, reviewing the collective bargaining experience from a later perspective than James P. Begin, sees its contribution in a positive light. Far from destroying governance, collective bargaining is a form of self-governance by the faculty. In the area of financial stress in higher education, the collective bargaining agent serves as an efficient means by which the faculty can make their economic needs heard by the institution and by the governmental structures upon which these institutions are becoming increasingly dependent.

The American Federation of Teacher (AFL-CIO) is in the forefront of developing collective bargaining relationships at all levels of educational institutions. Approximately 1,000 affiliates have established collective bargaining relationships. Since 1967, AFT affiliates at more than 240 institutions of higher education have established collective bargaining relationships. Based on this experience, we can state positively that collective bargaining and joint governance are compatible and coordinating structures.

As stated by Albert Shanker, President of the AFT and International Vice-President of the AFL-CIO:

> "Governance procedures that are found in higher education can continue to exist. There is no conflict with unionization. As a matter of fact, collective bargaining in most parts of the world is moving toward what is now referred to as worker-participation or co-determination. In every sector of this economy, I think we are going to see greater participation in the actual operation of the institution."

Experience in the field of collective bargaining shows conclusively that it has not caused the demise of joint governance. Instead, it has and will continue to serve a cooperative role in protecting the faculty at institutions of higher education from the increasing economic pressures which threaten the very existence of many educational institutions.

SUMMARY.

The Court of Appeals based its decision on the premise that the role of the faculty in the operation of Yeshiva University is so pervasive as to require a finding that the faculty are managerial employees. Although the court purports to limit its holding to the factual situation presented at Yeshiva University, its rationale is applicable to a large number of institutions of higher education which have joint governance structures.

This decision is in conflict with the decisions of the First Circuit Court of Appeals in *NLRB* v. *Wentworth Institute*, 515 F. 2d 550 (1975), and *NLRB* v. *Boston College*, 525 F. 2d 301 (1977). It is further a challenge to the doctrines developed by the NLRB in numerous representational proceedings.

The Circuit Court's finding that faculty input into such areas as hiring new faculty, determinations to grant tenure, and cirriculum choices require a finding of managerial status misinterprets the role of the faculty. Rather than serving as managers, faculty act from the basis of their own self-interest and from the perspective of their professional expertise. Further implicit in the court's finding is a determination that collective bargaining and joint governance are necessarily conflicting and antagonistic.

A review of the collective bargaining relationships already established demonstrates that joint governance and collective bargaining have been cooperative in most institutions, and, in

many, collective bargaining has strengthened joint governance. Based on the experience with collective bargaining at approximately 600 institutions of higher education, it can be seen that collective bargaining and joint governance are compatible and the coordination of these structures serves as the best method for professional educational employees to meet the economic and academic challenges they face.

Respectfully submitted,

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